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Freeing Free Speech



by Chris Rehn

The tongue is a flaming fire, the very world of iniquity. (*NIV*. James 3:6a)

Freedom of speech, individual rights, the establishment of autonomy, the freedom from governmental restraint—these are magic phrases. The trick is to take those magic phrases and fill them in with the content that will then generate the outcome that you desire. (From “‘There is No Such Thing as Free Speech’: An Interview with Stanley Fish,” [*Australian Humanities Review*, 1994])

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Not too long ago, a discussion with a colleague at Dordt College led me to see the peculiar breadth of free speech. We were debating something that seems to have little to do with free speech—Dordt’s admissions strategy. I suggested that Dordt should market more forcefully to the evangelicals because I believe that many evangelicals would embrace a more structured approach to the academy, as found in Dordt’s philosophy of integral Christian education. One of my colleagues strongly disagreed, going so far as to suggest that his covenantal relationship with his family does not allow him to put his children in a classroom with evangelicals. My colleague’s and my conversation directed me to the many permutations of free speech, America’s most valued liberty. While he is not typical of all Dordt faculty, he had essentially argued that a certain type of *expression*—evangelical—had no business on our campus. Put in terms of a legal analogy, my friend sees the evangelicals presenting a “clear and present danger” to Dordt, much as the Supreme Court saw the clear and present danger the seditionists posed during the incipient days of free-speech jurisprudence. In both cases the response is to silence or exclude the speaker, for less speech is—must be—better than more.

Free speech is a natural point of scholarly departure for someone who teaches law-related classes at an institution known for rooting out the world-and-life views behind creaturely structures. “Liberty” has long been touted as the “worldview” of the American legal regime, and Free Speech is seen as its best and brightest child. In fact, the Supreme Court expressly identifies free speech as Americans’

foundational right.¹ Thus, any attempt to detail the essence of the American legal landscape gravitates toward an exegesis on free speech, just as any attempt to illuminate our free-speech jurisprudence with a faith-based perspective requires the additional step of comparing the Supreme Court's narratives on free speech with the themes we find about speech in Scripture. And even though the majority of the actors in our legal regime don't adhere to a covenantal philosophy and are directionally at loggerheads with a Christian worldview, the comparison is still fruitful in that it reveals both the type of speech and the process we should use as Reformers seeking to reform all of the world's words for the Kingdom of God.

Synopsis

After sifting through several seminal Supreme Court cases in a historical look at how our jurisprudence has developed around free speech, I look back to a famous Puritan who wrote what may well be the Christian treatise on speech. His ideas provide a relevant starting point for any Christian response to the Supreme Court's doctrine, as they are sated with a faith-based world-and-life view, some of which may be surprising to the contemporary Christian. Additionally, we will see that many of his ideas antedate the Supreme Court's rhetoric, which borrows many of his normative ideas on the makeup of a free speech paradigm. I use his insights as a springboard for observations about some of the traps into which Christians fall in their engagement with free speech, and conclude by proposing how we Christians should go about "speaking freely." Before tackling this assignment, I must add that this in no way provides a comprehensive overview of American free speech jurisprudence. I intentionally ignore such subjects as the state-action doctrine² and the public-forum doctrine,³ as well as any detailed analysis of, among other things, obscenity laws or hate speech. Also absent is any detailed review of the effects of federalism on free speech.⁴ While these areas are fascinating subjects, such a detour would not substantially contribute to my purpose in this paper, which is to identify a better understanding of how a Christian should engage our legal culture, in particular in the foundational area of free speech. In this way I hope to demon-

strate how my Christian faith shapes my work in a specific discipline.

History of Free Speech under the United States Constitution

Nearly forty years ago the Supreme Court said, "one man's vulgarity is another's lyric,"⁵ and it has correspondingly spit forth many cases that put American jurisprudence squarely on the most permissive side—indeed what many might deem the vulgar side—of the free-speech spectrum. According to the Supreme Court, for example, the First Amendment protects the lyrics of 2 Live Crew, who rap about "busting" a girl's genitals in the song "Me So Horny."⁶ It protects a magazine when it runs a parody of a prominent preacher having sex with his mother in an outhouse.⁷ It protected the 1928 *Dailey News* when it ran a moment-of-death photo of Ruth Snyder in the electric chair, just as it protects the *Globe's* 1997's stolen autopsy photos of Jon Benet Ramsey.⁸ It protects Super Bowl commercials that show a flatulent horse and a dog biting a man's genitals.⁹ It protects the "expressive" speech of a burning cross on an African-American family's lawn.¹⁰ In fact, "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."¹¹ It is not surprising to see Christians recoil from the foregoing forms of protected speech. But developing what is one of the world's most permissive applications of the doctrine of free speech did not begin conspicuously.

Free speech, in fact, garnered little attention from the Supreme Court for nearly a century and a half of our existence as a country. For much of American history, speech was highly restricted, even given what appears to be a First Amendment wording that appears to be strongly pro-speech.¹² The States seem to have imported sedition laws wholesale from England; and even Thomas Jefferson,¹³ the author of the Declaration of Independence, urged their use against his political opponents. In 1798 Congress likewise promulgated the Alien and Sedition Act, which was highly restrictive of speech critical of the Federal Government. Congress did so, apparently with the approval of most of the Founders.¹⁴ And, for nearly one hundred years

after the Alien and Sedition Acts, the free-speech doctrine lay dormant, the Supreme Court employing a hands-off approach to the First Amendment. In fact, the only speech-saving formulation of these years was the prior-restraints doctrine, an adaptation from English law that had protected the press from the King's censors prior to publication.¹⁵ And while the doctrine did technically free some discourse, it

Holmes' "clear and present danger test" became a free-speech bellwether that would influence free speech doctrine for the next fifty years.

was neither adopted wholesale,¹⁶ nor did it prohibit the government from punishing the speech once it entered the public square.

The Supreme Court entertained few free-speech cases; and those that it did, ran upstream in highly turbulent constitutional waters. In fact, the first free speech cases upheld convictions of agitators involved in "public discourse," speech that today would be considered core speech by the Supreme Court. The Court was unsympathetic to any form of speech that had a tendency to produce any kind of harm, no matter how tenuous the link between the speech and the harm, either in degree or distance. The Court's test of the appropriateness of speech came to be called the "bad tendency" test, and it allowed a multitude of restrictions on harmful speech. But World War I and Congress' promulgation of the Espionage¹⁷ Act in 1917 offered an opportunity for reappraisal of the parameters of the First Amendment, especially since many thought that the Espionage Act served as much to chill speech critical of government policies as it did to protect the government from subversion. American free speech jurisprudence thus first elicited the Supreme Court's positive attention in several World War I era cases dealing mostly with radicals who were censured and incarcerated under

the Espionage Act, which, among other things, attempted to censor speech critical of the war effort. On to this stage stepped a brilliant man who would forever alter the way we look at free speech. Indeed, in a very short period of time, over the seventy-five years after the World War I cases, free speech would become unquestionably the most important right in a litany of rights in the American Constitution: "Freedom of thought and speech...are the matrix, the indispensable condition, of nearly every other form of freedom."¹⁸

In the 1919 case *Schenck v. United States*,¹⁹ Justice Oliver Wendell Holmes, Jr., upheld the conviction of a prominent socialist jailed for distributing leaflets urging draftees to resist the World War I draft. Holmes famously said that in order for the Supreme Court to restrict the speech, the words must pose "a clear and present danger" that they will "bring about the substantive evils that Congress has a right to prevent."²⁰ Holmes' "clear and present danger test" became a free-speech bellwether that would influence free speech doctrine for the next fifty years.²¹ The clear and present danger test provided the methodology to eviscerate the bad tendencies test, as it allowed free-speech advocates to require a much tighter link between the harm and the speech ("clear and present" rather than just a "bad tendency") in order for the government to repress the speech. More importantly, it ushered in an age of a tremendous expansion in free speech jurisprudence (Holmes became a darling of the free speech enthusiasts), ultimately leading to free speech—in all its permutations—becoming the foundational right in American law.

Holmes used this new-look free-speech process (this time in the dissent) in a highly influential case that followed close on the heels of *Schenck*, *Abrams v. United States*. Abrams and other Russian immigrants had been distributing leaflets critical of the war-time Wilson administration and had received lengthy prison sentences under the Espionage Act. Holmes called the pamphlets "silly leaflets" of "poor and puny anonymities" and fumed against the convictions of their distributors. Because of the influence of the academic community and with the support of the early American Civil Liberties Union, Holmes attacked speech restrictions with far more enthusiasm than he had in *Schenck*:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.²²

Holmes' marketplace of ideas metaphor was the green light for a no-holds-barred competition for the truth.²³ Added to the mix was Holmes' conviction that this free-for-all energizes the polity and the individual. (We'll see that these are ideas that were originally published in a pamphlet attacking censorship of the press in seventeenth-century England.) This awakened platform for free speech was, obviously, quite a departure from the Supreme Court's century-and-a-half inattention to the First Amendment, but it would continue almost unabated.

Ten years after *Abrams*, Holmes' fellow justice, Louis Brandeis, in *Whitney v. California*,²⁴ justified freeing speech because of the importance of democratic deliberation, and therewith elevated political speech to the highest rung of constitutional protection.²⁵

Those who won our independence believed that the final end of the State was to make men free to develop their faculties.... They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile... that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.²⁶

This shift to a viewpoint favoring *more speech rather than less* would continue to build momentum. In fact, democratic deliberation has become one of the most persuasive speech justifications, so much so that some have suggested that First Amendment protection of political dialogue should be absolute.²⁷ And whereas most of the free-speech cases from

1930 through 1970 in America involved political dissidents challenging the political orthodoxy, other categories of speech would elicit Supreme Court deference,²⁸ thereafter (including offensive speech and hate speech) culminating in a free-speech jurisprudence that is one of the most permissive in the world.²⁹

The Marketplace of Ideas Model of *Abrams* (or the competitive search for truth), and the Self-Government Model of *Whitney*³⁰ are regularly anthologized as two of the three major models underlying free speech. (I will detail the third, the Liberty Model, shortly.) There are aspects of these models that Christians might correctly identify as anti-normative. For example, we might suggest that the Marketplace Model highlights competition at the expense of truth. The speaker who better markets his or her speech wins. Or we might suggest that the Bible hardly seems to insist on democratic self-government as the only valid form of government, let alone as an appropriate rationale for free speech. Just because it captures the spirit of the open political dissent favored by the Founders does not make it a persuasive justification for speech. Nonetheless, these cases rest most fundamentally, I believe, on a worldview that is normative—the belief that *more speech is better than less*.

The civil rights movement and opposition to the Vietnam War produced a move toward greater protection of speech in the '60s and '70s. Perhaps the most cited example is *California v. Cohen*.³¹ On April 26, 1968, at the height of the Vietnam War, Robert Cohen entered the Los Angeles County Courthouse. He was wearing a jacket that said "F--- the Draft." Cohen was arrested under the California Penal Code for disturbing the peace by offensive conduct and was jailed for thirty days. The Supreme Court, in an opinion written by John Marshall Harlan, reversed his conviction, finding that Cohen's expression was a clear-cut example of public discourse, thus deserving of the utmost protection under the First Amendment. More importantly, *Cohen* expressly established the point that speech has an "emotive function" as deserving of protection as its cognitive function. *Cohen* thus linked the strength of the political protest to the offensiveness of the language used, a striking development. *Cohen* stands for the third major model

of free speech, the Liberty Model, the model most closely associated with self-expression and individualism, two ideas at odds with a Christian sense of community and family. This model sees value in speech as speech—the individual should have the right to choose his or her form of expression. Indeed, *Cohen* is the case cited earlier that proposes that one man’s lyric is another’s vulgarity.

It is not difficult to anticipate what developed following *Cohen*. (Many Christians would call it a slippery slope.) If offensive language positively contributes to political speech, why wouldn’t other forms of expression also positively contribute to political speech? The doors were opened to forms of expression that ran counter to the Christian intuition about appropriate speech. And whereas Christians might agree with aspects of Holmes’ marketplace metaphor, based as it was on the theory that a robust, uninhibited exchange of ideas will lead to the discovery of truth, they would most likely be far more circumspect about *Cohen* with its emphasis on self-expression, especially given the types of “self-expression” to which they’ve subsequently been exposed.

In 1977 the Chicago-based faction of the American neo-Nazi party demanded the right to march through the “village” of Skokie, a Chicago suburb with a Jewish population of forty thousand, several thousand of whom were Holocaust survivors. Their intent was to terrorize and to humiliate the Jewish residents with brown shirts, jack boots, swastikas and placards inscribed with “White Free Speech.” Despite the Seventh Circuit’s self-evident disgust for the message the protesters wished to convey, it ruled a ban on such a protest unconstitutional because it would infringe on the neo-Nazi’s right to free speech.³² This ruling was not surprising, in that the Seventh Circuit was constrained by Supreme Court case-law, which by 1977 was highly speech-protective. Thirteen years after *Village of Skokie*, in the middle of a summer night in Minnesota, a group of teenagers fashioned a cross from a broken chair, placed it in the fenced-in yard of a new neighbor, a black family, and lit it on fire. Despite the terror that such an act would surely cause in a Nation with a history of brutality fashioned by racism, the Supreme Court protected the teenagers’ expressive action and struck the St.

Paul ordinance that prohibited hate speech.³³ The problem with the ordinance was not that it chilled high-order speech; the problem with the ordinance was that it was content-based—aimed at only certain types of hate speech.³⁴ Justice Scalia pointed out that, “even when government is regulating a supposedly ‘unprotected’ category, it may not do so in a content-based manner.” The case illustrates not only the Court’s particular animus towards content-

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based regulations,³⁵ but just how few lines it is willing to draw even when considering outlaw categories of speech. The Court believes that the government must almost never skew Holmes’ marketplace of ideas towards one side or the other. Its role is to remain neutral and to ensure that a forum exists in which ideas may be exchanged, contested, and shaped. The Supreme Court of the United States unashamedly believes that more speech is better than less.

Milton and Free Speech

Any look at free speech should look backward to the great Puritan poet John Milton. Milton is, of course, best known as the author of *Paradise Lost*. Lesser known is the fact that Milton wrote what may fairly be called “the foundational essay of the free speech tradition,”³⁶ the *Areopagitica*, a polemic that fumed against censorship of the English press. Milton wrote his essay in response to censorship laws that the English Parliament promulgated in an attempt to appease the Scottish Presbyterians, whose support Parliament needed in its war against Charles I.³⁷ The *Areopagitica* anticipates several of the American rationales for free speech and presents an exciting vision of how a vibrant, normative, free

speech jurisdiction might look. Correspondingly, this vision brings into relief the timidity—and the dullness—of our own speech. Below, I focus on two of Milton's free speech themes (and on one of my own) in the effort to compare current American free speech with a Biblically informed view of free speech, and, in so doing, hope to make some suggestions on how the Christian may better align his or her speech with a normative pattern of speech.

Truth Will Defeat Falsehood

Milton firmly believed that we should regularly unfurl truth in the public square because it will ultimately prevail over falsehood: "And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting, to misdoubt her strength. Let her and Falsehood grapple: who ever knew Truth put to the worse, in a free and open encounter."³⁸ (Holmes obviously borrows from this idea, though he modifies it with his marketplace metaphor—he never expressly says that truth will always defeat falsehood.) This is not self-evident to many Christians, however, who have, I believe, an inordinate fear of falsehood defeating truth. In the Christian academic setting, we encounter this fear of speech not only with students but also with faculty and the greater community. Our students fear viewpoints that will uproot them from the traditions of their parents; faculty likewise fear viewpoints that will contravene the academic stasis into which we too often fall. We unjustly correlate new ways with wrong ways. As communities dread the incursions that immigrants cause to established patterns and customs, so we fear the effects that new and different *speech* will have on our regularities. We justify our defensive mentality with the need to "protect" our children, our spouses, our schools, our communities from untoward influences. But too often this is an excuse to protect *ourselves*. The root of fear is ultimately our puny faith.

My colleague said he would not put his children in the classroom with evangelicals, his main point being that the (false) dualistic evangelical belief system would overwhelm his children's reformed one. Implicit in his argument is that falsehood (or at least what he believed to be falsehood) will prevail over truth. His children's true understanding of the faith

would falter before the evangelicals. And it is not enough to say that he is merely protecting his children for he likewise implicit in his argument is that the evangelicals' presence in the classroom, their "falsehood," would similarly defeat the influence of the instructors. Such is what flows, I argue, from a world and life view that deep down is unconvinced of the victory of Christ over the Father of Lies. It is the speech of withdrawal and surrender.

The practical ramifications of this structural assumption—that falsehood will defeat truth—are staggering. This is the genesis of censorship liberally applied, even to the point of using prior restraints—or worse. It is not a stretch to suggest that the Inquisition, the Salem witch trials, various book burnings and other extreme measures³⁹ are the results of a fear of falsehood bred by a soft faith. Furthermore, this posture is dualistic. In retreating from an encounter with certain types of speech (by not engaging it, by leaving it "out there"), we give the field to falsehood. By not welcoming evangelicals to our campus, for example, we allow evangelical Christianity to continue in its falsehood, if such be the case. We also make an assumption about the relative strength of our "truth." By suggesting it is unable to grapple with the falsehood, we suggest that it's an unconvincing truth. It's a truth that will be blown about by the slightest wind of doctrine. But this is not Milton's truth or Milton's speech. Nor, do I believe, is it the robust speech of the Bible. We need not fear falsehood. In fact, we have a duty to reclaim areas where falsehood has penetrated, to preach the word in season and out of season. Christian speech is fearless, full of faith, ready to confidently tackle falsehood. It is the speech that hurls mountains into the sea.

It is Good for Us to Encounter Falsehood

Second, the act of seeking truth (via free speech) strengthens us, especially in the sense that it builds on our communal natures. Milton argues that the very quest for Truth—and we must keep in mind that Milton's quest is an uncompromising one where Truth takes on Falsehood—makes us wiser and stronger. It refines our sensibilities. This argument would seem obvious. Christian speech, seasoned with grace, is to be not only uplifting but confrontational. Iron sharpens iron. We are told to

reprove, rebuke, exhort. This type of speech seeks out contrary speech and welcomes the ensuing debate. The early American republic was a beehive of debate producing numerous pamphlets and tracts grappling with an unimaginable range of societal issues. Central meetinghouses in towns churned with activity. Speech wrestled with speech. But contemporary Christians too often seek *agreement* rather than truth.⁴⁰

Milton saw this grappling for truth as especially important for the *community* where energetic debate leads to a resilient, growing and adaptive people.⁴¹ Much like the Framers of the Constitution, who envisioned an active liberty that leads to a virtuous society, Milton saw free speech—again, an aggressive, almost argumentative speech—as a necessary ingredient in a vibrant polity. (Recall that Brandeis likewise suggests that free speech consequently leads to a vibrant democracy.)⁴² Our communities grow as they contend for truth. This is truly a pluralistic vision, one that sees one of the most important functions of the community as its participation in

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sifting though conflicting ideas about what is right and wrong. And such communities thrive because in coping with competing ideologies, they become more adept at distinguishing truth from falsehood, at rising above dispute, at competent compromise. Indeed the more they exercise their energies in seeking the truth, the better they become at finding it. But in order to have conflicting ideas about the truth, a community must have people of different persuasions, creeds, backgrounds, and convictions. Different origins, different skin tones, a rainbow of attitudes and assumptions, all add to this responsible cacophony.

Too often, however, our first impulse is to create homogenous communities in which we have little need to contest competing notions about what

is true and what is false. We may justify this insularity by saying that we are protecting our children, our community, or our college. In our small town of Sioux Center we are dominated by a Dutch heritage and churches overflowing with families raised in the Christian Reformed tradition. Our sectionalism is further refined by populating one church with large numbers of our college's faculty members. Another is made up largely of "townies" and farmers. Yet another is for the Hispanics. Socially, couples most closely associate with couples whereas singles seek out other singles. We encourage children to spend time with children of a similar age, and seniors are placed in retirement centers with other seniors. This homogeneity is not limited to Sioux Center, Iowa, of course. The world is awash with factions seeking to isolate themselves from other factions. Normatively, we are a communal people, but we want like-minded, sanitized communities. And sanitized communities are static communities, for when we surround ourselves with those who are like-minded, we emasculate the quest for truth by eliminating contrary opinions with which to grapple, even though those opinions may be falsehoods.

But we must stretch this analysis even further, for Milton says that falsehood may even "serve to polish and brighten the armory of truth."⁴³ (John Stuart Mill—a luminary in the free speech movement—would build his persuasive essay, *On Liberty*, around just such an argument.) This is a rather shocking exhortation, for the *process* by which Milton sees the quest for truth as strengthening us is to *welcome* falsehood into the public square. This is counterintuitive—surely we don't need burning crosses on African Americans' lawns, magazine satire about Jerry Falwell copulating with his mother, or song lyrics celebrating harm to young women.⁴⁴ But even given these exceptional and rogue examples of free speech, this process is, I argue, a normative one.

For one, welcoming falsehood—exposing it—keeps falsehood from festering. Underground speech has a way of erupting at unfortunate times and in dastardly ways. Beware the leaven of the Pharisees. American constitutional jurisprudence recognizes this danger and has formulated the above-cited Safety Valve Model⁴⁵ of free speech in response. And yet Christians often *hide* "bad"

speech rather than expose it. We fear giving free play to speech that offends or shocks, or worse, that we believe will consume us. (This is, of course, yet another manifestation of fear that falsehood will defeat truth.) Our sometimes embarrassing efforts to censor speech bear the imprimatur of this mindset.

Furthermore, falsehood sharpens the contours of the truth. We refine and hone truth by allowing it interplay with falsehood. Put another way, truth is sharpened, not just by truth but also by *falsehood*. Confronting ideas inimical to our own ideas, indeed allowing such ideas free play in our backyards, serves to strengthen, shape and even redefine our grasp of the truth. I spend time every day responding to emails from a non-Christian friend of mine. Our latest disagreement was over prostitution. He believes it should be treated as any other exchange of labor governed by contract law. So long as the bargain is at arm's length and fair, it's fine. By having to entertain his numerous questions about prostitution in the Old Testament, Christianity and marriage, fornication, divorce rates and what-not, my own grasp of God's norms for relationships between men and women was strengthened. I recognized that the truth is far richer than I originally thought. Likewise when we are forced to tackle speech we consider antithetical to our own, we often find that we didn't have the complete grasp of the truth we initially thought we had. The outline of truth reaches a sharper focus, our soft beliefs are firmed, and often we are humbled by the process. Ultimately we are reminded that this quest for truth is not about us and our need to be right but rather is about glorifying the author of Truth. It is, however, far easier to retreat and leave the fight for another day or to another person or community altogether. Thus we quickly return to the communities of speech conformity I detailed earlier. And once a community successfully isolates itself, once our speech begins to go unchallenged, a strange thing happens, something I will consider at length below—good speech turns to bad.

Failing to Engage with Falsehood Turns Our Good Speech into Bad

Engaging falsehood does more than put the truth in greater relief: it saves speech from itself.

For speech left unexercised can turn on its own. It is interesting that James, who warns so stringently about the evils of the tongue, describes his Christian audience as quarrelling and fighting. He says they slander and judge each other. The image is of a once godly community fighting each other rather than fighting falsehood. In fact, instead of reforming the world, they have become a “friend of the world,” an “enemy of God,” according to James.⁴⁶ This friendliness with the world is evidently the fruit of the poisonous words that James describes a chapter earlier. It is not a stretch to suggest that their good speech has turned to bad.

The great evangelical founder of the Navigators, Dawson Trotman, said that Christians are born to reproduce. We are (re)created and compelled by the evangelical spirit to engage in the multi-faceted conversion and discipleship process. We are given a mandate to reshape and reform all of Creation. Reform is of our very essence as Christians. And the only way to do so is to mingle with non-Christians and expose ourselves to non-Christian influences in the participatory work of redeeming fields (and structures) “white for harvest.” If we don't produce good fruit—if we fail to reform—we wither like the fig tree of Jerusalem. We ultimately do the exact opposite of what we are called to do. Instead of giving birth, we die, for we deny our very essence. Likewise, when we allow our seasoned speech to lie fallow, when we refuse to engage it with ideas and expressions inimical to our own, it withers and dies. It becomes the opposite of what it's created for. It turns to bad speech. The Puritan expression moved from a “City on a Hill” in the first generation to burning witches at the stake in the third generation of their American experiment. Not coincidentally, I believe, the Puritans were noted for their strict and increasing censure of dissenting voices. Their good speech collapsed on itself.

Having lived in a somewhat sheltered Christian community for the last nine years has exposed me to many “poisonous words.” Gossip is rife, and slander is anything but uncommon. We are highly critical of each other and yet often dull to external influences. (Our complacent engagement with commercial speech in the form of advertising is but one example. We often adopt the dress, habits, and speech of those who advertise to us on the TV, in

movies, and over the internet.) It is significant that we are created as speaking creatures by the Living Word. God upholds the world by His speech. He speaks and things *are*. We image Him in our ability to speak words with purpose, resolve, and depth. Our speech is to be seasoned and is to be an example to the world. Indeed it is to impregnate the world with its Truth. When we remove our speech from the world, when we cloister ourselves in Christian communities, we are no less speaking creatures. But our speech has no Kingdom-building outlet. Rather than engaging with non-Christians and non-Christian structures, our speech focuses back on us. It is no longer sharpened by engagement with falsehood and atrophies. Even worse, the impulse to speak redirects itself against us.⁴⁷ Falsehood festers. Seasoned speech rots.

Conclusion

Like all of God's creation, speech must be redeemed. The free speech paradigm entertained by Milton and developed by the Supreme Court counsels more speech rather than less. But this counsel often produces speech in our public squares and elsewhere that the Christian rightly distinguishes as offensive, rude, irresponsible, hateful, even dangerous. But this result, I'm convinced, is not due to a fundamental flaw with the First Amendment. In part, rogue speech is simply a function of the directional orientation of the speakers. Non-Christians speak non-Christianly. We should expect free speakers, many of whom have worldviews dramatically different from our own, to produce words antithetical to those produced by our Christian worldview. Furthermore, an open speech paradigm welcomes directional interpretations of speech that clash with ours, though it may be couched in reformed language. Along those lines, any inspection of American law encounters legal language that is conspicuously normative—truth, justice, equity, and fairness are all normative concepts that we find thoroughly integrated in our laws—even though the application of those principles often yields results at odds with what we as Christians would anticipate. Stanley Fish, cited at the beginning of this paper, calls free speech a “magic phrase,” intimating that we need to take the magic phrase and fill it with the content that will give us the outcome we want. He

is correct in at least one sense, and that is that some worldview will always fill in the contours of speech. When we fail to engage these false worldviews, they will triumph. Furthermore, when we fail to exercise our true worldviews, they will decay.

Years ago a friend of mine led a Bible study on “The Words of Our Mouth.” She developed an extensive list of warnings from the Bible about speech: “A gossip betrays a confidence; so avoid a man who talks too much.” “He who guards his lips guards his life, but he who speaks rashly will come to ruin.” “No man can tame the tongue. It is a restless evil, full of deadly poison.” “The tongue also is a fire, a world of evil among the parts of the body. It corrupts the whole person, sets the whole course of his life on fire, and is itself set on fire by hell.” Her Biblical citations highlight our propensity as Christians to focus on what we should

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these false worldviews, they
will triumph.*

not say. Constitutionally, Christians likewise focus on what the Supreme Court should suppress. Our energies are those of the censor rather than that of the evangelical. But a Reforming perspective on speech structurally involves much more than holding our tongues or making others hold theirs. It's a process whereby we not only expose ourselves to speech contrary to our own but actively engage it. This is an easy cup to pass, as the call to speak can be dreadful: Moses begged God to let Aaron speak in his stead; Jonah fled from the call to Nineveh; Isaiah cried out, “Woe is me, for I am a man of unclean lips.” Speaking forth may involve risk, judgment, and fear. Engaging bad speech may sully us. And trotting our speech out into the public square may ultimately humble us if we discover our “truth” trumped. As creatures made in the image of the Word of Life, however, we are called to speak forth Christianly. Our seasoned speech is testimony to the world of our Christ-likeness. Virtue, according to Milton, could not remain cloistered. The Bible directs us to cry out for the Lord with our words:

“You are the light of the world. A city on a hill cannot be hidden.”⁴⁸ It is tempting to retreat from free speech. But the challenge of the Bible, Milton, and, indeed, the First Amendment, is not one of less speech but one of more.

Endnotes

- 1.. See *Palko v. Connecticut*, 302 U.S. 319, 327 (1937).
2. The State-Action Doctrine insists that freedom of speech and other foundational rights only secure us against actions by government. In other words, private actors may restrict our freedom of speech (or other rights secured by the Constitution) without running afoul of the First Amendment.
3. The Public Forum Doctrine identifies what areas are “public forums.” (e.g., parks and highways are; airports are not.) The Supreme Court gives speech enhanced protection in these areas.
4. Thus the Supreme Court’s early lack of attention to speech issues was not necessarily shared by the state courts. An historical analysis of the states’ interaction with free speech, however, would have significantly lengthened this paper without altering its conclusions.
5. *Cohen v. California*, 403 U.S. 15 (1971).
6. “Artistic” expression such as 2 Live Crew’s song “Me So Horny” falls under the protection of the First Amendment.
7. *Hustler v. Falwell*, 485 U.S. 46 (1988).
8. Freedom of speech and freedom of the press are often mutually supportive.
9. Commercial speech is a relatively recent addition to the forms of speech protected by the Constitution. See *Co. v. Sullivan*, 376 U.S. 254 (1964), *New York Times*.
10. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377 (1992).
11. *Texas v. Johnson*, 491 U.S. 397 (1989).
12. The First Amendment to the United States Constitution reads in part, “Congress shall make no law...abridging the freedom of speech.”
13. Nonetheless, Jefferson would oppose the Alien and Sedition Act, apparently as a means to appease the electorate and secure the Presidency.
14. Some, however, demurred. James Madison opposed any type of sedition act because of the democratic paradigm. Since the people are sovereign in the United States, so the argument goes, they must be free to deliberate about those questions related to good government.
15. While this highly restrictive formulation of the free speech doctrine would find little support today, it had much support in the early days of the Republic. The famous British jurist William Blackstone, who influenced many a Founder, was one such advocate of just such a restrictive approach. Josef Story, the leading early commentator on the Constitution, likewise supported a prior-restraints analysis.
16. Whereas a system of prior restraints bears “a heavy presumption against its constitutionality,” certain types of speech may still be restrained prior to their dissemination or publication, including obscenity and speech that unfairly prejudice a criminal trial, among others. In *Near v. Minnesota* (1931), chief Justice Hughes indicated that the government might restrain speech that might harm national security, speech that was obscene, and speech that might lead to violence in the community. The Pentagon Papers case provided a forum for a great deal of Supreme Court disagreement about what might be restrained.
17. The Espionage Act prohibited declarations against the Federal Government that would bring the government into disrepute.
18. *Palko v. Connecticut* at 327.
19. *Schenck v. United States*, 249 U.S. 47 (1919).
20. Holmes is seated firmly in the Pantheon of United States Supreme Court justices, probably only behind the famous Chief Justice John Marshall, in influence on the interpretation of the Constitution.
21. This was unintended by Holmes, who had to be convinced by his academic friends that society is better served by allowing dissident speech.
22. *Abrams v. United States*, 250 U.S. 616, 630 (1919).
23. Holmes’ speech friendliness is not surprising, given his worldview. Holmes was perhaps the first of the Legal Realists, who believed that law is not ultimately derived from statutes and ordinances but rather from the predisposition of judges or courts in their application of those legal abstractions. Legal Realist Jerome Frank even famously postulated that a ruling might be because of what a judge had for breakfast. (Compare this with the Reformed notion that all decisions are made with a religious orientation and are made in a specific context. They are not dissimilar.) Because law was no longer about picking the appropriate legal text and applying it to the case at hand, judges were to use law as a social tool to bring about corrective social change, a use that dovetailed precisely with Holmes’ admonitions

- regarding free speech.
24. *Whitney v. California*, 274 U.S. 357 (1927). Brandeis sees this consequential approach in self-government terms: “Those who won our independence believed that the final end of the state was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty... [also] that public discussion is a political duty; and that this should be a fundamental principle of American government.”
 25. The Supreme Court would later specifically state that it would err in the direction of more speech rather than less: “It is precisely this kind of choice between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.” *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748 (1976).
 26. *Whitney* at 375.
 27. Professor Meiklejohn’s self-government theory values speech insofar as it enables self-government though formation of the public will. Robert Bork, former Supreme Court nominee, is another who champions an absolutist view regarding political speech.
 28. The shift to the requirement for imminent danger in the context of the speech liberated the doctrine, though even the danger test could be manipulated, as it was during the Cold War era in the case of *Dennis v. United States*, in which an agitator’s conviction was upheld even though the advocated action had no possibility of success. Nonetheless, the danger test was reinvented in *Brandenburg v. Ohio*, in which freedom of expression was upheld unless the speech produced “imminent lawless action.”
 29. The liberalization of American speech largely continued during the slow relative ascendancy of the First Amendment “absolutists’ position, first driven by Justices William O. Douglas and Hugo Black in opinions beginning in the 1950s and reinforced by the press and organizations like the American Civil Liberties Union.
 30. Brandeis adds another rational for free speech (The Safety Valve Model) when he warns that “it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.”
 31. *California v. Cohen*, *supra*, fn 4.
 32. *Village of Skokie v. National Socialist Party of America*, 69 Ill. 2d. 605 (1978).
 33. *R.A.V. v. City of St. Paul, Minn.*, *supra*, fn 9.
 34. The ordinance outlawed fighting words based on race, among other things, but allowed other types of fighting words. The Court was unwilling to support this content-based construction.
 35. It also underscores the Supreme Court’s determination to uphold free speech even over against other cherished values such as equality. The majority implicitly rejected the notion that fighting words applied to traditionally marginalized groups should be banned from the public square.
 36. See Vincent Blassi, “Milton’s *Areopagitica* and the Modern First Amendment” in *Ideas* (National Humanities Center, January 1997). I use Blassi’s article as a reference for several main points of Milton’s *Areopagitica*. Blassi argues, however, that it’s a mistake to attempt to apply Milton today because the source of the *Areopagitica*’s appeal “was so much a function of its religious underpinnings that the secular counterpart can draw no sustenance from Milton’s thought.” I obviously disagree with Blassi’s conclusion.
 37. The Scotts wanted a theocratic model of polity in tune with their Calvinist theology. Milton himself had been heavily censured by his Christian brethren when he wrote a tract on divorce that did not comport with the standard Presbyterian doctrine.
 38. John Milton, quoted by Vincent Blassi in “*Areopagitica* and the Modern First Amendment,” *Ideas*, (National Humanities Center, January, 1997).
 39. Famous Supreme Court examples are the Japanese internment cases, *Hirabayashi v. United States*, 320 U.S. 81 (1943) and *Korematsu v. United States*, 323 U.S. 214 (1944).
 40. It’s interesting to note that one of the grand themes underlying our somewhat recent free speech jurisprudence is neutrality. Any restriction on speech must address all speech equally or it runs afoul of the First Amendment. Perhaps the tightest construction of the neutrality doctrine is found in *RAV v. City of St. Paul*.
 41. Blassi states this forcefully: What we *can* say, and this seems to me the crux of *Areopagitica*, is that without a robust commitment to free-wheeling disputation, without a public culture permeated by the clash of opinions, it is impossible to sustain a vigorous, adaptive, resilient society, capable when

- occasion demands of acting on high purpose. *See* fn 37.
42. See the discussion of *Whitney v. California* on p. 5, *infra*.
43. This looks a bit like common grace, but it is more radical. Rather than simply saying that non-Christians can use good speech, Milton actually dares to suggest that evil speech will hone good speech. This itself is normative, as God may use evil speech to “work together for good.”
44. Obscenity is unprotected by the Supreme Court; hate speech, at least in some instances, is protected.
45. See footnote 27, *supra*.
46. See *New International Version*, James 4:5.
47. Speech additionally turns on itself in an ironic way. When we attempt to censor others, we adopt the self-serving “rights” language (“It’s my right not to be offended..”) that we Reformers call “individualism” in others. Speech becomes “about us” and what we are willing to tolerate. We ignore the sacrificial engagement with the world demanded by our Lord.
48. *New International Version*. Matthew 5:14.